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No. 395.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6. (Rec., p. 4.)

The defendant then pleaded not guilty, his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

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He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled, he was sentenced, on July 28, 1905, to be imprisoned and kept at labor in the penitentiary for five years. (Rec., p. 26.)

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, a writ of error was sued out from this court, and a motion to dismiss the same is pending.

He has also filed a petition for a writ of certiorari to the Court of Appeals of the District of Columbia.

THE INDICTMENT.

The third count of the indictment, under which the plaintiff in error was convicted (Rec., p. 1–2) is as follows:

> And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:
>
> That on the twenty-third day of November, in the year of our Lord one thousand, nine hundred and three, and at the District aforesaid, said Andrew A. Lipscomb and said Thomas M. Fields were receivers; that is, to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth

day of November, in the year of our Lord one thousand eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled *The Washington Beneficial Endowment Association* versus *The Commercial Alliance Life Insurance Company;* that on the said twenty-third day of November, in the year of our Lord, one thousand nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receivers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid, on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the

same, against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

THE STATUTE.

Section 841 of the District Code, effective January 1, 1902, under which this indictment is drawn, is as follows:

> Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both.

THE FACTS.

The evidence shows that the plaintiff in error and his codefendant were appointed on November 6, 1894, receivers in the case of *The Washington Beneficial Endowment Association* v. *The Commercial Alliance Life Insurance Company*, being equity cause No. 15907, in the Supreme Court of the District of

Columbia; that they took possession of the property in dispute, and on May 13, 1895, sold the real and personal property for $22,210, the sale being reported by them to, and ratified by, the court; that the proceeds of the sale were deposited in the West End National Bank, and on March 20, 1897, the balance in that bank was, by order of the court, deposited with the Washington Loan and Trust Company, at interest, pending appeal; that the receivers made reports from time to time, the first report being dated March 20, 1897, and the last report being dated November 23, 1903; that the auditor of the court also made several reports, one of his reports, dated July 31, 1900, showing a net balance in the hands of the receivers after allowing them credits for costs, charges, and commissions of $15,090.74; that the last report of the auditor, dated December 7, 1903, after adding interest on $15,090.74 from July 31, 1900 (said interest amounting to $1,532.26), and deducting costs, charges, and commissions, finds a balance in the hands of the receivers of $15,876.57; that on May 5, 1904, the court passed a decree ratifying the auditor's report of December 7, 1903, and ordering distribution of the balance found by the auditor; and that no distribution was in fact made, the said decree of May 5, 1904, not having been appealed from.

The testimony also shows that between March 20, 1897, and June 23, 1903, the receivers gradually reduced the certificates of deposits held by order of the court and opened other accounts in their personal names; that checks were drawn against said

accounts; that some of the withdrawals from the certificates of deposit, and some of the checks, agreed in amount with the particular amounts allowed the receivers by the auditor in his reports, "but certain of said withdrawals, and some of said checks, do not correspond with any credits allowed by the auditor or claimed by the defendant;" that nine or more of the checks were payable to the plaintiff in error, and were indorsed by him and paid over the bank counter to him in cash without further indorsement; that all the checks drawn after August 8, 1903, bore the genuine signature of the defendant and his coreceiver; that of $1,300 drawn on a check dated September 8, 1903, the defendant furtively delivered $1,000 in cash to his coreceiver. The testimony further shows that the defendant absconded in June, 1904, and was discovered and arrested on March 9, 1905, at Rayville, N. Y., where he was passing as Doctor Brown.

A more comprehensive and logical narrative of the facts, as proved at the trial, is impossible, on account of the incomplete character of the bill of exceptions.

The defendant offered testimony of three witnesses, but did not himself testify, and offered no testimony of good character.

BILL OF EXCEPTIONS.

Counsel for plaintiff in error contend that the bill of exceptions must be taken to contain the substance of all the testimony in the case, under the rulings of this court in the cases of *Clyatt* v. *U. S.*, 197 U. S., 207, and *Gunnison County* v. *Rollins*, 173 U. S., 255, and

of the Court of Appeals in the cases of *Klopfer* v. *D. C.*, 25 App. D. C., 41, and *Rockwell* v. *Capital Traction Company*, idem, 98.

In the *Clyatt* case it is held (syllabus):

> Where the bill of exceptions, after referring to the impaneling of the jury, contains recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness, at the close of all of which there were further recitals that the parties rested, these statements are sufficient, even in the absence of a technical affirmative recital to that effect, to show that the bill of exceptions contains all the testimony, and defendant is not to be deprived of a full consideration of the question of his guilt by such omission; and even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed.

And in the case of *Gunnison Co.* v. *Rollins* it is held that a bill of exceptions may be taken to include all the evidence, although it does not expressly state that fact, if the entries sufficiently ciently show that all the evidence is included.

In the *Klopfer* case the Court of Appeals said, at page 43:

> It is elementary law that in order that an appellate tribunal may pass intelligently upon the ruling of a trial court, the record must give and must purport to give the substance of all the testimony bearing upon such ruling.

The second paragraph of the syllabus of that case is as follows:

> A bill of exceptions in a case in which a verdict was directed for the defendant at the close of all the testimony is sufficient, although it does not in terms purport to contain all the testimony, or the substance of it, where it states, after giving in detail the testimony of the witnesses on both sides, that "counsel for both plaintiff and defendant announced that they had no further testimony to offer and rested their case," and it is not contended as matter of fact by the appellee that any substantial testimony has been omitted.

The first paragraph of the syllabus of the case of *Rockwell* v. *The Capital Traction Company* is as follows:

> The requirement that a bill of exceptions must show that all of the evidence has been set forth, in order to warrant an appellate court in determining whether there was error in giving or refusing an instruction to direct a verdict, is sufficiently complied with where the bill of exceptions purports to recite the evidence in the order of its introduction, giving the name of each witness, stating that the action of the court in directing a verdict for the defendant was "founded on all the evidence as above set forth on behalf of the plaintiff," and that each of the questions reserved by the plaintiff during the trial was upon the whole evidence, "the substance of which whole evidence is included in the bill of exceptions."

The Government insists that the bill of exceptions in the present case neither contains nor purports to contain the substance of all the testimony.

The doctrine announced in the cases above cited is not questioned, but it is submitted that the present case is not governed by them, but is distinguishable, for the reason that the bill of exceptions not only does not purport to contain the substance of all the testimony, but, taken by its four corners, affirmatively shows that it does not contain the substance of all the testimony.

Where a bill of exceptions purports to set forth all the evidence, yet affirmatively shows that there was other evidence not included therein, the court will not undertake to determine whether the verdict was sustained by the evidence.

U. S. v. *Lowenstein*, 21 D. C., 515.

The Court of Appeals, after having its attention directed to the foregoing decisions, both of this court and its own, decided that this bill of exceptions is not to be taken as containing the substance of all the testimony.

In the case at bar there is no statement or combination of statements which can be distorted into an admission that the bill of exceptions contains the substance of all the testimony. The bill of exceptions, after setting out certain testimony, contains at the bottom of page 53 the following statement:

> At this point the U. S. Attorney, Mr. Beach, said: "The Government rests, if it please the court."

Pages 54, 55, and 56 contain the substance of the evidence offered by the defendant as shown by the following statement on page 56:

> The foregoing is the substance of all the evidence offered by the defendant, who thereupon rested.

This is followed by the statement:

> The Government then announced that it had no further evidence to offer.

There is nothing else anywhere in the bill of exceptions referring to whether or not the bill contains the substance of the testimony.

Counsel for the plaintiff in error contend that the last quoted statement, taken in connection with the preceding statements, makes a case similar to the *Klopfer* case, but it is submitted that the only significance of the last quoted statement is that the Government had no evidence in rebuttal to offer.

A reference to the general charge of the court, to which no exceptions were taken by the defendant, clearly shows that the court instructed the jury upon questions of fact concerning which no reference is made in the bill of exceptions. One of these charges is at the bottom of page 68 of the record, in reference to letters in the nature of confessions, which had been offered in evidence by the Government, which are not mentioned in the bill of exceptions.

The following facts concerning one feature of the evidence makes it patent that the bill of exceptions

does not contain nor purport to contain the substance of all the evidence:

At page 37 of the record it appears that the witness Hawken identified the "supplemental account of the receivers, dated November 23, 1903, bearing the genuine signature of the defendant."

Beginning at the bottom of page 45 the following appears:

> Mr. EASBY-SMITH. I now offer the final report of the Auditor, filed December 7, 1903. It is undated.
>
> Mr. BAKER. Do you claim the receivers made a report after this?
>
> Mr. EASBY-SMITH. I do.
>
> Mr. BAKER. Where is that report? Let me see it.
>
> Mr. EASBY-SMITH. I have not offered it yet.
>
> Mr. BAKER. I should like to look at it. We object to this because it would appear that the report of the receivers to which Mr. Easby-Smith refers was made before this report of the Auditor—November 23, 1903, and on the back of it is "Filed November 23, 1903."
>
> Mr. EASBY-SMITH. That is not a court filing.
>
> Mr. BAKER. No, not a court filing; but it was identified.
>
> Mr. EASBY-SMITH. Merely as to the signatures.
>
> Mr. BAKER. And this report of the Auditor was filed December 7, 1903, and after the date laid in the indictment.

> The COURT (after argument). The date does not cut any figure. The fact that the date is in that paper does not prove it was filed that day or made that day.

There is no further mention, anywhere in the bill of exceptions, of this account of the receivers, dated November 23, 1903, "bearing the genuine signature of the defendant," which the Government, at page 45, had not yet offered; but it is clear, from an examination of the indictment and a reading of so much of the testimony as appears in the bill, that this account of the receivers of November 23, 1903, was the pivotal fact in the case—was, indeed, the keystone of the whole prosecution. Yet, if this bill is to be taken as containing the substance of the evidence, this supremely important document was not even offered in evidence.

Another circumstance to be considered is that while the bill makes the statement that it contains "the substance of all evidence offered by the defendant," it makes no such statement concerning the Government's evidence, not even the statement that the bill contains "the substance of all the evidence relating to the defendant's exceptions."

All that it does contain are portions of the evidence and a number of statements, albeit true, shrewdly thrown in here and there for the purpose of making the bill, taken as a whole, appear to conform with the *Clyatt* and *Klopfer* cases, both decided a very short time before the bill was prepared.

But examined closely it does not comply with the requirements of the *Clyatt* case; it does not contain

"recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness." The witnesses, Parker and Eckloff, are mentioned (pp. 40, 41), but the substance of their testimony is not pretended to be given, and the statement on plaintiff in error's brief, at page 202—

> Then follows the testimony of various other witnesses for the United States, including Young, *Parker, Eckloff*, Pinchback, Schayer, Donaldson, Tyser, Robinson, and Padgett, that of each being preceded by a statement in form similar to this:
>
> The United States then offered as a witness in its own behalf Dr. Young, * * * who, having been duly sworn, testified as then recited—

is not true as to the witnesses Parker and Eckloff. And in the case of no witness is it stated that he "testified as follows" or "testified in substance."

It affirmatively appears that there were witnesses produced for the Government who gave testimony, but are not even named in the bill. (See Rec., 39.)

On the brief of the plaintiff in error, at page 204, appears the following statement:

> In the trial court it was stipulated in writing by the then counsel for the Government that this bill contains the substance of all the evidence in the case having relation to or in anywise connected with our exceptions.

This statement is beyond the record, but, as an admission of counsel for plaintiff in error, it has a significant bearing upon this question. If there was

such a stipulation (and there was), it must have been in the bill of exceptions itself (as it was), and not being now in the bill must have been stricken out by the trial judge before he signed the bill (as it was). Therefore the bill is not to be taken to contain either "the substance of all the testimony" or "the substance of all the testimony relating to the defendant's exceptions."

Counsel can not stipulate the correctness of a bill of exceptions not signed by the trial judge. (*Malony* v. *Adsit*, 175 U. S., 281.)

The contention of counsel for plaintiff in error that this bill of exceptions contains the substance of all the testimony has, therefore, no foundation in fact, and the arguments based upon the contention are untenable, whether relating to instructions granted or refused by the trial court, or to the sufficiency of the evidence, or to the general charge of the trial justice, or to the alleged misconduct of the prosecutors concerning statements made in the course of argument to the jury concerning matters not elsewhere referred to in the bill of exceptions.

A judgment entered on the verdict of a jury will not be reversed by the Supreme Court on writ of error upon the ground that there is absolutely no evidence to sustain it, where the bill of exceptions does not show that the evidence contained therein is all the evidence that was given on the trial.

(*U. S.* v. *Copper Queen Min. Co.*, 185 U. S., 495.)

The court will not pass upon the correctness of a charge which depends upon the evidence in the case, unless there is a bill of exceptions setting out the evidence.

U. S. v. *McBride*, 18 D. C., 371.

CONSTRUCTION AND APPLICATION OF THE STATUTE.

The plaintiff in error attempted in the trial court and in the appellate court, and now attempts in this court, to draw in question the validity of the foregoing statute. An examination of the record demonstrates that this question has not been and can not be properly raised in this case.

In his demurrer to the indictment the defendant sets down, among others, the following points:

> *i*. Neither said section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.
>
> *j*. The said section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the equal protection of the laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights; especially so if given any retroactive effect. (Rec., p. 3.)

In his motion in arrest of judgment he again attempts to raise the question.

> 2. Because Code, sec. 841, is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property, by forfeiting all right or claim to any vested commissions, costs, and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession. (Rec., p. 19.)

It is to be noted that the words of the statute are "shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *so coming into his possession and converted or appropriated* to his own use."

In his statement of supposed errors, filed in the Court of Appeals, the appellant says:

> The court erred: 1. In holding Code of the District of Columbia, section 841, to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional.

We have, then, in both courts, two questions attempted to be raised—one as to the *construction* and *application* of the statute, the other as to the *constitutionality* or *validity* of the statute.

It is to be observed that in the "statement of case and assignment of errors" filed in this court March 5, 1907, the plaintiff in error does not raise the question of *constitutionality* or *validity* of the statute.

It is, indeed, argued that forfeiture is part of the punishment and should have been included in the

judgment and that the judgment, not including forfeiture, is void.

This question will be discussed later under the head of "the judgment."

But the argument that forfeiture should be included in the judgment reduces the question to one of the *construction* and *application* of the statute and not of its *validity*. So in the last analysis the questions raised by the plaintiff in error all refer to the construction and application of section 841 of the District Code and not to its constitutionality.

It is argued that the statute is not applicable to this case, because it is purely prospective and includes only receivers appointed after January 1, 1902, when the Code went into effect, and property which comes into the possession of such receivers after said date.

The Government did not, and does not, contend that this section has any retroactive in the sense of *ex post facto* effect, or that it pretends to or can denounce any act committed before it went into effect.

A retrospective law is one which contemplates or affects an act done or a right accrued before its passage. (8 Cyc., 1017.)

Section 481 of the Code is in no sense an *ex post facto* law.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict.

In plain words, the plaintiff in error contends that under this law a receiver who was appointed and received property on December 31, 1901, could with impunity convert to his own use that property, then or on any day thereafter.

The Government's contention, on the other hand, is that this section is intended to cover any act of embezzlement committed after the law went into effect, regardless of the mere time the property came into the possession of the person committing the act.

Plaintiff in error claims that the words "may come" must necessarily be construed as of the future and as of the time when the property is received.

The Government contends that these words are merely part of the description of the property made the subject of embezzlement, and have no reference to time, either past or future. It was clearly the intention of Congress to punish all future acts of embezzlement by receivers and other fiduciaries. That the phrase "may come" as used in this section, in contradistinction to the words "who shall fraudulently convert," occuring in the same sentence, was used advisedly by Congress, and was intended to be merely descriptive of the sort of property made the subject of embezzlement, seems self-evident. In order to sustain the contention of plaintiff in error, it is necessary to substitute for the word "may" the word "shall," and utterly disregard the clear intent and spirit of the statute.

The old rule requiring a rigidly strict construction of penal statutes has been relaxed greatly since the

days when many offenses were punishable by death.

In a long line of cases, beginning with the case of *United States* v. *Wiltberger*, 5 Wheat., 76, this court has uniformly held that the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

> See also, to the same effect, *American Fur Co.* v. *U. S.*, 2 Pet., 358; *U. S.* v. *Morris*, 14 Pet., 464; *U. S.* v. *Reese*, 92 U. S., 214; *U. S.* v. *Hartwell*, 6 Wall., 385.

In the case of *Bolles* v. *Outing Company*, 175 U. S., 262, cited by plaintiff in error, this court said (p. 265):

> The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. *In both cases it will endeavor to effect substantial justice.*

And in *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59, it was said:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

The words "may come" in this statute are merely descriptive of the property which is made the subject of embezzlement; that is, a receiver into whose possession property "*may come by virtue of his office,*" who shall fraudulently convert the same to his own use, shall be guilty of embezzlement of the property *so coming* into his possession and converted. *How coming? Coming by virtue of his office.*

The sense of the words is not dependent upon tense, either past or future. They are descriptive. They are expressive of mere potentiality.

The only portion of the statute necessarily future in its operation is the conversion "who *shall* fraudulently convert or appropriate."

What was the real intent of the legislature may be better ascertained by considering the other sections of the District Code relating to embezzlement.

Section 833 provides:

> Whoever *being charged* with the collection, receipt, etc., of property * * * *fraudulently converts* * * * the property * * * *received, controlled,* or *held* by him * * * shall be deemed guilty of embezzlement.

Section 837 provides:

> Any person *intrusted* with anything of value, etc., who *fraudulently converts* the same * * * shall be deemed guilty of embezzlement.

Section 838 provides:

> Any warehouseman * * * who * * * converts to his own use any property *intrusted* or *consigned* to him * * * shall be deemed guilty of embezzlement.

In these sections the present participle, "being charged" and the past participles "received," "controlled," "held," "intrusted," "consigned," are used in their descriptive capacity, and without reference to time or tense.

In *Murphy* v. *Wheatley*, 100 Md., 358, it is held that a law governing corporations refers to a trust company subsequently incorporated by a special act of the legislature, as well as to corporations already incorporated, the language of the law being "every * * * company *incorporated* under any law of this State."

Endlich, in his Interpretation of Statutes, says:

> SEC. 280. But a statute is not retrospective in the sense under consideration because a part of the requisites for its action is drawn from a time antecedent to its passing. (*Per* Lord Denman in *R.* v. *St. Mary*, 12 Q. B., 127; *R.* v. *Christchurch*, idem., 149.) * * * The court of chancery, which acquired jurisdiction under the 23 and 24 Vict., c. 35, to relieve in respect of the forfeiture of a lease in consequence of a breach of a covenant to insure, exercised this new jurisdiction where the breach occurred after, but the lease had been made before the act was passed. (*Page* v. *Bennett*, 2 Giff., 117; 29 L. J. Ch., 398.) * * * And so an act "for the better security of mechanics" was held applicable when the work was done after the law took effect, though the contract therefor was entered into before its passage. (*Miller* v. *Moore*, 1 E. D. Smith (N. Y.), 739.)

And as to the application of new laws to a continuing state of affairs see Lewis's Sutherland on Statutory Construction, section 674.

Endlich says again:

> SEC. 283. It is hardly necessary to add, that (constitutional objections being out way) whenever the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear. (Citing: *Stead* v. *Carey*, 1 C. B., 496; *Bell* v. *Bilton*, 4 Bing., 615.) Retrospective laws, unless *ex post facto*, or impairing the obligations of contracts, do not fall within the prohibition against such laws contained in the Constitution of the United States. (Citing: *Calder* v. *Bull*, 3 Dall., 386; *Satterlee* v. *Matthewson*, 2 Pet., 413; *Watson* v. *Mercer*, 8 Pet., 88; *People* v. *Supervisors*, 63 Barb. (N. Y.), 85; *Reed* v. *Beall*, 42 Miss., 472; *Grim* v. *School Distr.*, 57 Pa. St., 433; *Lane* v. *Nelson*, 79 Pa. St., 407; *Smith* v. *Gilder*, 26 Ark., 527.) * * * Hence, within the scope of legislative power, an act will, and must, be given a retroactive efficacy, where such an intention clearly appears. (*Bambaugh* v. *Bambaugh*, 11 Serg. & R., (Pa.) 19.)
>
> See also Endlich, section 321, and cases cited, including *Woodbury* v. *Freeland*, 82 Mass., 105; *Maysville, etc., R. R. Co.* v. *Herrick*, 13 Bush. (Ky.), 122.

Upon this question see also Lewis's Sutherland on Statutory Construction, sections 335, 580, and 674.

The statute of 1839 (Ky.) authorizing adminis-

trators to file bills against heirs, etc., and the court to decree sales of real estate, applies to cases where the decedent died before its passage as well as where he died afterwards.

Fitzhugh v. *Fitzhugh's Adm.*, 6 B. Mon., 4.

The law is clearly applicable to the facts of the present case, and was correctly construed and applied by the trial court and the court below. As so construed and applied it is not an *ex post facto* law. The forfeiture clause is not, nor has it been, in issue in this case.

PORTION OF THE EMBEZZLED FUND RECEIVED AFTER THE CODE TOOK EFFECT.

In the preceding argument it has been assumed that all of the property embezzled was received before the statute took effect.

But it appears from the reports of the Auditor (Rec., p. 36) that on July 31, 1900, the receivers were chargeable with a net balance of $15,090.74 (the money being invested in interest-bearing certificates of deposit under the order of court of March 20, 1897); that on December 7, 1903, they were chargeable with an additional amount, for interest, namely, $1,532.26, received between July 31, 1900, and December 7, 1903, the greater portion of this interest having been earned and received by the receivers after January 1, 1902, when the Code became effective.

So that a portion, at least, of the property embezzled by the plaintiff in error was received by him after the Code took effect.

SUFFICIENCY OF THE INDICTMENT.

The indictment, above set out, charges that the plaintiff in error and another were receivers appointed by the court on November 6, 1894; that as such receivers they had possession of $15,974.07, the property of the Washington Beneficial Endowment Association, which had come into their possession by virtue of their office and employment as such receivers; and that on November 23, 1903, in the District of Columbia, they "did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby embezzle the same."

All the elements of the offense of embezzlement are here set forth with precision and certainty.

Evans v. *U. S.*, 153 U. S., 584, 587.
Potter v. *U. S.*, 155 U. S., 438, 445.
Moore v. *U. S.*, 160 U. S., 268.

The conversion is clearly enough alleged in the indictment, which states that the receivers "did unlawfully and fraudulently convert and appropriate the same to their own use."

The words "convert to his own use" have a well-known legal signification; and it is not necessary in an indictment charging embezzlement to allege the particular means by which the conversion was effected.

Gassenheimer v. *U. S.*, 26 App. D. C., 432.
Moore v. *U. S.*, *supra.*
Grin v. *Shine*, 187 U. S., 181, 189.

And it is a well-known rule of pleading that less particularity is required when the facts lie more

in the knowledge of the opposite party than of the party pleading.

> Perry, Common Law Pleading, 378.
> *Rider* v. *Smith*, 3 T. R., 766.
> *Denham* v. *Stephenson*, 1 Salk., 355.
> *Attorney-General* v. *Meller*, Hard., 451.
> *Gale* v. *Reed*, 8 East., 80.

The criminal intent to defraud was clearly enough alleged by the use of the word "fraudulently."

> *State* v. *Reynolds*, 65 N. J. L., 424.

MOTION FOR BILL OF PARTICULARS.

The motion to compel the Government to furnish a bill of particulars was served on the United States attorney Thursday, May 4, 1905, and was called up on Monday, May 8, 1905, the day set down for the trial of the case. The United States attorney objected to the consideration of the motion because he had had only one clear day's notice of the motion, namely, Friday, whereas rule 88 of the common-law rules of the Supreme Court of the District of Columbia requires two days' notice.

The record shows (page 29) that—

> the court requested to hear the point of the motion and after hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained.

This motion came too late under the rule, and would have been too late even in the absence of the rule, the trial having been set for the same day the motion was called up, more than a month after the indictment was

filed. Furthermore, it was properly refused on the merits, for, in a case of embezzlement by a receiver or other fiduciary, the facts and particulars of his trust are peculiarly within his own knowledge.

On motion of the accused the prosecutor may be required to file a bill of particulars in a criminal case; but the granting of such a motion is within the sound discretion of the trial court.

Lauer v. *D. C.*, 11 App. D. C., 453.

MOTION TO RESTORE PAPERS.

The exception of the plaintiff in error to the refusal of the court below to order certain papers restored to the clerk's office seems sufficiently disposed of by an examination of the record relating to the proceedings in court concerning this motion, at page 29, Record, and of the affidavit of the United States attorney, at the top of page 17.

The contention of plaintiff in error that he and his counsel were denied inspection of certain public records is misleading and is not supported by the record, which shows at pages 28 and 29 the following (from the bill of exceptions):

> * * * It appeared by agreement of counsel that upon last Thursday the United States Attorney had invited the defendant and his attorney to examine the papers at any time in his office. The United States attorney states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against. * * *
>
> * * * * *

> The COURT. My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect so that the district attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the district attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the District Attorney.

It nowhere appears that the plaintiff in error was prejudiced in the slightest degree by the course pursued by the trial court.

MOTION FOR CONTINUANCE.

This court has said, in the case of *Isaacs* v. *U. S.*, 159 U. S., 487, 489:

> That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

The doctrine is particularly well settled in the District of Columbia that an application for the continuance of a cause is addressed to the sound discretion of the court, and its action therein is not subject to review, except in cases of clear abuse of this discretion.

Bradshaw v. *Stott*, 7 App. D. C., 276.
Foertch v. *Germuiller*, 9 App. D. C., 196.

The grounds for this motion were (1) the issuing of the commission to take testimony of two New York witnesses and letters rogatory to take the testimony of a witness in London, England, and the absence of these witnesses, and (2) that defendant and his counsel had not had sufficient time to prepare his defense.

It is to be observed that when the court granted the commission the order concluded (Rec., p. 7): "Ordered that upon application of the defendant, process issue commanding said William T. Gilbert and Henry D. Hotchkiss to appear at the trial of this case." This order was made on May 4, four days before the trial came on. Subpœnas in a criminal case out of a court of the United States run anywhere within the territorial limits of the United States. If Gilbert and Hotchkiss could have been reached so as to give their testimony in New York, they could have been reached by compulsory process.

Furthermore, the plaintiff in error did not state in his affidavit (Rec., pp. 10–16) the specific facts which he expected to prove by the absent witnesses, but rather, for the most part, conclusions; nor did he state that he believed the testimony, which he expected the witnesses to give, to be true; nor did the affidavit comply otherwise with the rules laid down in the authority cited in his brief at pages 85 to 87.

As to the second ground, that he and his counsel had not had time to prepare his defense, his own affidavit shows that he had had more than a month.

Clearly there was no abuse by the trial court of its undoubted discretion in overruling the motion.

This argument refers also to the defendant's thirtieth exception to the ruling of the court denying defendant's motion to withdraw a juror and discharge the jury because the defendant had not crossed the defendant's interrogatories to his New York and London witnesses. (See Rec., bottom of p. 56.)

EXCEPTIONS AS TO ADMISSIBILITY OF COURT PAPERS IN THE EQUITY CAUSE.

The plaintiff in error attempts to raise here the question that the court papers in equity cause No. 15907 and consolidated cases, which were offered and received in evidence in the trial court, were not properly proved.

He also assigns as error the admission of the court papers in violation of section 860, Revised Statutes, United States.

His contention that these questions were raised in the court below or that any objection on such ground was made as to any single court paper offered in evidence is absolutely without foundation.

The offers as to these papers, objections to their admission, and the manner and extent in which they were received in evidence, appear in the record as follows, as to each of said papers:

The original bill was offered and received in evidence without objection (Rec., p. 30).

The order appointing the receivers was offered (p. 31), was objected to by the defendant because passed before the Code took effect, because of vari-

ance between it and the indictment, and these objections were overruled and the order admitted (p. 32).

The order of sale was offered (p. 32), objected to because it shows property coming into the hands of the receivers before the Code, because it was dated December 1, 1894, and because it shows on its face that the property is real estate. The objections were overruled and the order admitted (p. 32).

The report of sale made by the receivers was offered, objected to for the same reasons as set out as to the last preceding paper, and was admitted in evidence (p. 32).

The order *nisi* ratifying the sale was objected to for the reasons last stated, and because it is irrelevant and immaterial, and because it does not relate to the property described in the indictment, because there is nothing to show that the receivers had any connection with the paper, and because it states the price for which the property was sold, and the paper was admitted (p. 32).

Final orders ratifying the sale of realty and personalty were offered, the same objections were made as to the order of sale and order *nisi*, and the papers were admitted (p. 32).

The decree of Justice Cox of June 27, 1896, was offered and received without objection as showing a reference to the auditor only (p. 33).

A report of the defendants, dated March 20, 1897, as to deposit of proceeds of sale, and an order passed the same day authorizing and approving deposit were offered, were objected to for the reason that the report

and order preceded the Code, and the papers were admitted (p. 34).

Three reports of the defendant as receiver, bearing the defendant's genuine signature, were offered, were objected to by the defendant because there was nothing to show that they were court papers and parts of the record, because they are statements in regard to money that came into the defendants' hands before the Code, because they antedated the Code and the statute of limitations, but the reports were received in evidence (pp. 34–35).

The auditor's report of July 31, 1900, was offered and was objected to by the defendant because it contains findings of facts, and it was not at that time admitted in evidence (pp. 35–36).

The auditor's report, filed December 7, 1903, was offered (p. 36), and was again offered (p. 45). It was objected to because it would appear that the final report of the receivers was made before this report of the auditor (p. 46). It was again offered, after said objection, as to the schedule of Lipscomb & Fields, and as to the schedule of distribution. Objection was made without stating the reason of the objection p. 46). It was finally received in evidence as to both schedules thereof (p. 47).

The decree of Justice Cox of June 27, 1896, was reoffered (p. 46), was objected to by the defendant "for the same reasons stated in his former objections to said decree" (there had been no former objection to the said decree, it appearing at page 33 that the said decree was offered in evidence without objection

as tending to show a reference to the auditor only), and the objection was sustained as to the second clause and the first clause was admitted.

The auditor's report of July 30, 1900, was offered as to Schedule A, to which the defendant objected, without stating any reason, and "only said Schedule A of said report was received in evidence" (p. 45).

The auditor's report of August 30, 1900, was offered, to which defendant objected, for the reasons stated in the last exception (there being no reasons stated in said last exception), and the said report was received in evidence (p. 45).

The decree of May 5, 1904, ordering distribution in equity No. 15907 and consolidated cases, including equity No. 16072 (in which appellant was a party defendant, Rec., pp. 50–51), was offered (p. 47), objected to by the defendant for the reasons stated in his exception 23 (namely, because it postdated the time of the offense alleged in the indictment, (p. 47), and the decree was admitted.

Original bill in equity No. 16072 (*James S. Edwards, adm.*, v. *The Washington Beneficial Endowment Association, The Commercial Alliance Life Insurance Company, and Andrew A. Lipscomb and Thomas M. Fields, receivers*) an order consolidating said cause with equity No. 15907, demurrer of Lipscomb & Fields, and the answer of Lipscomb & Fields, bearing the genuine signature of the appellant, were identified (Rec., p. 49).

The bill in equity No. 16072 was offered and objected to by the defendant as irrelevant, because

he is not charged as receiver in said cause; overruled. Defendant withdrew his objections to paragraphs 18 and 19 of said bill, and they were received in evidence (p. 49).

The order of consolidation was offered, the same objections made, and the order admitted (p. 49).

The answer of Lipscomb and Fields was offered as to paragraphs 18 and 19 and admitted without objection.

The whole bill in equity 16072 was reoffered, objected to for the same reasons by the defendant, and the objections were sustained except as to "the endorsements, with the file marks on the bill, the caption showing the interested parties, the opinion if there is one, and paragraphs 18 and 19" (p. 49).

The foregoing are all the court papers which appear in the bill of exceptions to have been received in evidence; and it appears that to no single one was objection made on the ground that it was not properly proved.

The only three papers to which such objections were urged were the three reports of the defendant, offered and admitted (pp. 34–35), and the objection was "because there is nothing to show that they are court papers and part of the record in this equity case."

They were identified by the witness Hawken "as being among said (court) papers, but not filed in the clerk's office." The witness identified the defendant's genuine signature on said papers.

Therefore these papers were not proved to be, or offered as, court papers, but as statements made and signed by the defendant.

It clearly appears, therefore, that the question as to whether or not the court papers were properly proved was not raised below, and that the assignments of error in this respect have no foundation in the record.

Nor was section 860, Revised Statutes, mentioned in any objection to the introduction of court papers.

Taken altogether, the competency and relevancy of each of the court papers received in evidence is clearly apparent, despite the interminable arguments and laborious citation of cases in the brief of the plaintiff in error.

An appellate court will not pass upon a general objection to testimony, or upon any reason for objection which is not stated at the time of the objection in the trial court.

An objection to evidence which does not point out the specific ground upon which it is made will be disregarded on appeal.

Wash. Gaslight Co. v. *Poore*, 3 App. D. C., 127.

An objection to a question as "immaterial, incompetent, and inadmissable" will not be considered on appeal when the record shows no more specific ground of objection nor whether the question was answered.

Hazleton v. *Le Duc*, 10 App. D. C., 379.
Moore v. *Bank*, 13 Pet., 302.

Catts v. *Phalen*, 2 How., 376.
Carter v. *Carusi*, 112 U. S., 478.
D. C. v. *Woodbury*, 136 U. S., 450.
Woodbury v. *D. C.*, 5 Mackey, 127.
Prindle v. *Campbell*, 18 D. C., 598.

Several of the objections to the admissibility of the papers in the equity cause are based on the fact that they show that the property mentioned in them is not money, as described in the indictment, but is real estate. But the defendant admitted, in the reports signed by him (p. 34), and in his answer to the bill in equity cause 16072, that he had taken possession of the real estate and had converted it into money, and had possession of that money.

> A prosecution for embezzlement may follow money embezzled through a dozen investments, so long as it is in the embezzler's hands.
> Wharton, Criminal Law, sec. 1016.

EXCEPTIONS TO ADMISSION OF BANK DEPOSIT SLIP.

The bank deposit slips, although written by bank clerks, were clearly competent for the reason that the Government offered to prove and did prove that the defendant checked against the accounts to which said deposit slips related (Rec., p. 39).

EVIDENCE AS TO DIFFERENT ACTS.

It is assigned as error that the trial court erred in receiving evidence of 92 separate items, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the

indictment alleging but a single act on one certain date.

The following extract from the general charge of the trial justice (Rec., p. 69) shows that the jury was fully, carefully, and correctly instructed as to its duty in considering this evidence:

> Respecting a point which was touched upon by the district attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items.
>
> If you find from the evidence that after January 1, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, then you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only

be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent—if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

CORPORATE EXISTENCE OF THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION.

The laws under which the Washington Beneficial Endowment Association was incorporated were the acts of Congress of June 17, 1870, and May 5, 1870, as contained in sections 553 *et seq.* of the Revised Statutes for the District of Columbia, published in 1875. Section 553 is as follows:

> Any three or more persons who desire to form a company for the purpose of carrying on any kind of manufacturing, agricultural, mining, mechanical, insurance, mercantile, transportation, or marketing business, in the District or savings bank therein, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the recorder of deeds, a certificate in writing, in which shall be stated:

First. The corporate name of the company and the object for which it is formed.

Second. The term of its existence, not exceeding twenty years, except in cases of corporations formed only for the purpose of life-insurance.

Third. The amount of the capital stock of the company and the number of shares of which said stock shall consist.

Fourth. The number of trustees who shall manage the concerns of the company for the first year, and their names.

Fifth. The name of the place in the District in which the operations of the company are to be carried on.

Section 557, which provides that the failure to elect trustees shall not dissolve the corporation, is as follows:

> In case it shall happen at any time that an election of trustees shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election of trustees, in such manner as shall be provided by the by-laws, and all acts of trustees shall be valid and binding as against said company until their successors shall be elected.

The corporate existence of the Washington Beneficial Endowment Association was proved at the trial of this case in two ways—first, by introducing in evidence a copy of the original certificate of incorpo-

ration, and, secondly, by oral testimony proving its *de facto* corporate existence.

The copy of the certificate of incorporation was introduced in evidence in the following manner (Rec., pp. 41–42).

Walter A. Pinchback testified that he is employed in the office of the recorder of deeds and that he had searched for the original certificate of incorporation of the Washington Beneficial Endowment Association in the files where it ought to be kept and that he could not find it. He produced and identified two books, numbered 1 and 2, called Acts of Incorporation, and testified that book numbered 1 began May 23, 1870. The liber copy of the certificate of incorporation of the said association was then offered in evidence; and the Government then called Colonel Schayer, who testified that he was employed in the office of the recorder of deeds for more than thirty years, a portion of the time being from 1869 to 1886; that in said office was kept a series of libers called Acts of Incorporation; that they were kept under the general incorporation act of Congress; that the custom was to record all certificates whether required by law to be recorded or not; that a ruling of the office required them to be copied; that he knows the handwriting of the copyist who made the liber copy of the certificate of incorporation of the Washington Beneficial Endowment Association; that that copyist is now dead; that it was his duty to make the copy in the said liber and compare it with the original.

The liber copy of the said certificate was then received in evidence. It appears at page 43 of the record.

Among the incorporators of the association, as appears from the certificate, was one R. B. Donaldson.

The *de facto* existence of this corporation was proved in the following manner:

R. B. Donaldson testified that he was one of the incorporators of the Washington Beneficial Endowment Association; that he thought the said association was incorporated in 1873; that he was not only an incorporator but was president for twelve years; that it had a secretary and treasurer; that it carried on a life insurance business; that he was not a stockholder in 1893 or 1894 and had no knowledge as to whether the company carried on business since 1893 (Rec., p. 44).

John Joy Edson, a witness for the defendant, testified that he was a stockholder of the said association at the time it failed in 1894; that it was then doing business on Tenth street (Rec., p. 54).

One Eckloff, cashier of the Second National Bank, testified that he knew there was at one time in existence in Washington the Washington Beneficial Endowment Association, and that it did business; that he knew Mr. Gardner, its president; that he never had a policy in it but paid other policies and paid Mr. Gardner; that he paid other people's premiums for them; that it was in 1879 or 1880 when he knew that it was doing business at No. 419 Tenth street, N. W.;

that he does not know when it ceased to do business, but understands that it did cease (Rec., p. 41).

The various pleadings in equity cause No. 15907 and consolidated cases, which appear in the record, show that the Washington Beneficial Endowment Association was sued as a corporation, and that in these very suits the plaintiff in error was not only a receiver, but was an actual party defendant.

It also clearly appears from the various documents and oral testimony in the record that the said association owned and occupied in its corporate name the very real estate which was the basis of the equity suit No. 15907, and which was the very property taken possession of by the defendant as receiver.

The method in which corporate existence may be proven in criminal proceedings is set down in the tenth volume of the Cyclopedia of Law and Procedure, page 242, as follows:

> In criminal prosecutions, when the question arises whether the company is incorporated, for instance, in the case of a prosecution for a larceny of the property of an alleged corporation, or for the forgery of the bills of an alleged banking corporation, it is only necessary to show that the corporation exists *de facto*, and this may be proved by general reputation; in other words, by proving by oral testimony that it is a corporation *de facto*, doing a business as such. In such a proceeding proof of the existence of the corporation may, indeed, be demanded, but it seems that it is never necessary to produce the charter; and in a criminal

> prosecution for trespass upon the property of an alleged corporation, it has been reasoned that it is enough that the body described as a corporation is in the possession of the land described in the indictment, under its corporate name and was so in possession long before the commission of the trespass.

Citing the following among other cases:

> *People* v. *Frank*, 28 Cal., 507.
> *Smith* v. *State*, 28 Indiana, 321.
> *People* v. *Caryl*, 12 Wend. (N. Y.), 547.
> *State* v. *Thompson*, 23 Kansas, 338.
> *Reed* v. *State*, 15 Ohio, 217.
> *People* v. *Barrie*, 49 Cal., 342.
> *Johnson* v. *People*, 4 Den. (N. Y.), 364.
> *Searsburgh Turnpike Co.* v. *Cutler*, 6 Vermont, 315.

In the same volume of the same work, at page 241, the following doctrine is laid down:

> The existence of a corporation may be proved by reputation, and by its actual use for a length of time of the powers and privileges of a corporation; and this, we shall see, is the mode of proof in criminal cases.
>
> See also *U. S.* v. *Amedy*, 11 Wheat., 392, 409.
> *Stockbridge* v. *West Stockbridge*, 12 Mass., 399.
> *Dillingham* v. *Snow*, 5 Mass., 547.

It is submitted that the ruling of the trial court in admitting in evidence the liber copy of the certificate of incorporation was correct, the proper foundation having been laid by evidence tending to prove the loss of the original certificate, and the copy being properly proved.

Conceding, however, only for the sake of the argument, that the court erred in admitting this copy in evidence, this error was not prejudicial to the defendant because the *de facto* existence of the corporation was subsequently fully shown.

The existence of the corporation having been shown, the burden of proof of showing its dissolution is on the defendant.

> *Electric Light Co.* v. *Leiter*, 19 D. C., 575 (1887).

In the same case it is held:

> A corporation is dissolved neither by its failure to elect trustees nor by its insolvency; in either case it may still sue and be sued; it loses its franchise only by a surrender by the shareholders or through forfeiture by the State in a suit instituted for that purpose.

In *Morrow* v. *Edwards*, 20 D. C., 475, the court said (pp. 477–8):

> This court has no power to dissolve a corporation. The sovereign power alone can do that. The Attorney-General of the United States can by proper proceedings inquire into the legality of the incorporation where the acts are said to be such as to forfeit the right to a continuance of the charter.

The Court of Appeals held in the case of *Brown* v. *Cement Co.*, 1 App. D. C., 232:

> The authorities are practically unanimous to the effect that a corporation does not lose its franchise or become legally dissolved by discontinuing its business, ceasing to main-

tain an office or to elect officers, or by becoming hopelessly insolvent.

See also *Weightman* v. *Critic Co.*, 4 App. D. C., 136.

A corporation is not dissolved by the fact that from failure to elect, or otherwise, the number of trustees becomes reduced to a less number than by charter are empowered to act. Its franchise would only be suspended until restored by legislative action.

Vincennes University v. *Indiana*, 14 Howard, 268;

Taylor v. *Bowker*, 111 U. S., 110;

First National Bank of Bethel v. *National Pahquioque Bank*, 14 Wallace, 383.

Although a corporation has ceased the prosecution of the object for which it was organized, its corporate powers remain unimpaired for the collection of debts, the enforcement of liabilities, and the payment of creditors.

Glenn v. Liggett, 134 U. S., 533.

The ways in which a corporation may be dissolved are clearly set out in the tenth volume of the Cyclopedia of Law and Procedure at page 1270; and the fact that a corporation is not dissolved by neglecting to exercise its corporate powers, omission to elect officers, ceasing business, making an assignment of all its property, the sale or disposal of all its property, or insolvency is clearly shown in the same work at pages 1294 and 1295 and the cases there cited.

In the same work, at page 1298, the following important doctrine is laid down:

> It has not escaped the observation of capable judges that the dissolution of a corporation sometimes means an annulment of its franchises or a termination of its existence, and sometimes a mere judicial act which alienates its property and suspends its business without terminating its existence; so that the corporation may, for certain purposes, be considered as dissolved so far as to be incapable of doing injury to the public, while it yet retains vitality so far as is essential for the protection of rights of others.

Citing *In re* Independent Insurance Co., 13 Fed. Cases, 7017.

If a corporation can be sued, it is not dissolved.

Ib., page 1334 and cases cited.

Ib., pages 1302 and 1303.

A corporation does not become dormant because a single individual becomes sole owner of the corporate property and franchises by a purchase of the stock.

Newton Co. v. *White*, 42 Ga., 148.

It is to be observed that the defendant made little, if any, attempt to prove that the corporation was dissolved, and that his only witness on this point, Mr. Edson (p. 54), strengthens the evidence already offered by the Government to prove *de facto* existence.

The plaintiff in error argued below that the auditor and Justice Cox having decided in the equity case that the corporation was dissolved, and the

Court of Appeals having affirmed those decisions, the doctrine of *stare decisis* applied, and that court must therefore adhere to its former decisions and hold in the case at bar, on the strength of the former adjudications, that the corporation was dissolved.

The doctrine of *stare decisis* applies not to findings of fact, but to the construction and interpretation of law.

Furthermore, there was no evidence before the jury concerning the decision of the auditor, of Justice Cox, or of the Court of Appeals.

It clearly appears in the record that the second clause of the decree of Justice Cox of June 27, 1896 (Rec., p. 33), was not admitted in evidence, but was kept out of the case by the defendant's objection (p. 45); that that portion of the auditor's report of July 31, 1900 (pp. 35–36), relating to this feature of the case was not received in evidence, but only Schedule A of said report, relating to the account of the receivers (pp. 36, 45, 46, 65); that the opinions of Justice Cox and of the Court of Appeals were not offered in evidence (p. 52).

The findings of fact in the equity case, whatever they may be, were based upon evidence received in that case. The findings of fact in the case at bar are based upon the evidence submitted to the jury.

Furthermore, as above pointed out, a corporation may apparently be dissolved for some purposes and yet retain its full corporate vigor for other purposes.

In this case the plaintiff in error will not be heard to deny the existence of the association.

> 3. One who has acted as secretary of a society can not deny the existence of such society when prosecuted for a fraudulent breach of his trust (syllabus).
>
> *State* v. *Butler*, 21 S. C., 353.

In the last-cited case the court said at page 355:

> Upon the second question the circuit judge charged that if the jury, from the testimony, came to the conclusion that the defendant acted as the secretary of the order named, it would be too late for him to say now that there was no such society, but it was a question for the jury whether the defendant was the secretary of such society. This was in accordance with the case of *State* v. *Sellers*, 7 Rich., 368, where it was held that an officer who had assumed the duties of an office could not himself dispute the validity of his own appointment, even when proceeded against *criminaliter*.

"It may be remarked, also," says the court below, "that the defendant who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto*, at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status."

OWNERSHIP OF THE EMBEZZLED FUND.

In view of the abundance of evidence in the record proving that the real estate, and the money into

which it was converted, belonged to the Washington Beneficial Endowment Association, which evidence includes the defendant's admissions in his reports as receiver, and his answer in equity cause No. 16072, it seems only necessary to point out some of the fallacies in the argument of the plaintiff in error that this property ceased to belong to the said association.

It is argued that the said association deeded the real estate to the Commercial Alliance Life Insurance Company on August 9, 1894, and that, inasmuch as the court below instructed the jury "that the first paragraph of the decree of the 27th of June, 1896, revested no title to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association," therefore the endowment association had, thereafter, no title to the property. The instruction was correct; yet the endowment association did own the property. The decree revested no title, for the simple reason that title had never passed from the association.

The bill in equity cause No. 15907 alleged that the deed was obtained by fraud, and prayed "that a decree may be passed annulling the transfer of plaintiff to the defendant of all its property and the deed of its real estate as aforesaid and the same reconveyed by the court to the plaintiff."

The court did not order a reconveyance, but decreed that the said deed "be, and the same hereby is, set aside and held for naught." In other words, there never had been any deed, and the endowment association never had parted with the property.

When, then, did it part with the property? The record fails to answer. It is to be remembered, as pointed out above, that neither the second clause of Justice Cox's decree of June 27, 1896, nor his opinion, nor that portion of the auditor's report of July 31, 1900, relating to ownership, was received in evidence. And most of the argument of the plaintiff in error as to ownership is based upon the unwarranted assumption that this record evidence went to the jury.

And, after all, is the defendant to be heard to deny the ownership in the endowment association, even though third persons—creditors and others—might eventually have a better claim than the association to the property?

Wharton, in his Criminal Law (8th Ed.), says:

> SEC. 1025. It has been held that the servant can not, as is elsewhere seen, defend himself on the ground that his employer is not entitled in law to receive the money embezzled. For if, as between the master and servant, the servant holds the money of the master, the question whether the master could have claimed the money from a third party is irrelevant.

Citing:

Campbell v. *State*, 35 Ohio St., 70.
Waterman v. *State*, 116 Ind., 51.

And again Wharton says:

> SEC. 1038. It is no defense that the principals have no right, as against third parties, to the money which the servant embezzles.

Citing: *Com.* v. *Cooper*, 130 Mass., 285.

VARIOUS EXCEPTIONS TO ADMISSIBILITY OF EVIDENCE.

Some of the exceptions taken to the action of the trial court in admitting documentary evidence, including court papers, receivers' reports, bank accounts, checks, and so forth, are based on the ground either that they relate to property in possession before the Code went into effect or that they relate to matters which happened after the date alleged in the indictment.

The first question is cognate to the question raised in the demurrer, and is discussed under application of the statute.

The second question has no place here, for the reason that it is well settled that an offense need not be proved to have been committed on the day named in an indictment, but may be proved as of any day within three years immediately preceding the filing of the indictment.

All this evidence is clearly competent and relevant for the purpose of tracing this property through its various forms and through its various investments, from the time of its receipt by the receivers to the time of its dissipation or conversion.

The motion to strike out the testimony of Dr. Young in reference to two certain checks of June 28, 1895, for the proceeds of sale of real estate was properly overruled, the checks having been admitted without objection by the defendant (Rec., p. 38), and being both competent and relevant to trace the property.

Book No. 1, "Acts of Incorporation," was properly allowed to be identified in connection with Book No. 2, as showing when the recording of certificates of incorporation was begun under the incorporation law of 1870.

There was no possible prejudice to the rights of the defendant by the admitting of this book.

The deeds of real estate to the Endowment Association, and from the Endowment Association to the Commercial Alliance Life Insurance Company, were competent and relevant in connection with the evidence showing that the Endowment Association had possession of, and held and occupied in its corporate name, the real estate described in the said deeds; and the first clause of the decree of June 27, 1896, was then competent and relevant to show that the title to said property did not pass out of the Endowment Association by the deed to the insurance company.

The order of distribution of May 5, 1904, was clearly competent and relevant as evidence tending to prove conversion, especially when taken in connection with the testimony of the witnesses, Robinson and Padgett (p. 53), that the distribution had not been made by the receivers as ordered by the court in this final decree ordering distribution.

The bill in equity and other papers in equity cause 16072 were relevant as proving the defendant to have been not only receiver, but an actual party defendant in the consolidated cases, and also because they

proved admissions made by the defendant of his receivership and of his receipt and possession of the property described in the indictment.

EXCEPTION AS TO REFUSING DEFENDANT'S PRAYERS AS A SERIES.

The trial court was clearly right in refusing to consider the twenty-seven prayers submitted by the defendant as a series at the close of the testimony.

The record at page 57 and at the bottom of page 58 clearly shows that these prayers were submitted as a series, fastened together and numbered from 1 to 27. It is well settled in this jurisdiction that prayers offered as a series are properly refused.

U. S. v. *McBride*, 7 Mackey, 371.

Birmingham v. *Petit*, 21 D. C., 209.

A general exception taken to the refusal of a series of instructions will not be considered if any one of the propositions is unsound.

Union P. R. Co. v. *Callaghan*, 161 U. S., 91.

Furthermore, the record affirmatively shows that each of the twenty-seven prayers was subsequently separately offered to the court and passed upon, except as to four of them which were expressly abandoned by the defendant (p. 57).

EXCEPTIONS AS TO REFUSAL TO GRANT INSTRUCTIONS.

The first prayer of the defendant to instruct the jury upon the evidence to return a verdict of not guilty can not properly be considered by this court for the reason, above pointed out, that the bill of exceptions does not contain the substance of the evidence.

Waiving this fact, merely for the sake of the argument, the instruction was properly refused because even the incomplete bill of exceptions in the present record contains sufficient evidence to show that every essential allegation of the indictment was proved, as appears from the statement of facts set out above and the finding of facts by the court of appeals from the testimony in the bill of exceptions (Rec., p. 82).

This also applies to the refusal of the court to grant the fourth prayer asking for an instruction to the jury to return a verdict of not guilty on the third count.

The refusal to grant the fifth prayer asking for an instruction of acquittal on the sixth count was properly refused, and it is to be noted that the court subsequently, in its general charge, withdrew the sixth count from the consideration of the jury.

The ruling of the court upon the sixth instruction concerning property coming into the defendant's possession before the Code went into effect raises the questions already discussed under the demurrer.

The modification by the court of the defendant's seventh prayer for instruction was unquestionably correct, inasmuch as at the time the instruction was given only two and not four counts were before the jury.

The court was correct in refusing to grant the defendant's seventeenth prayer, which requested the court to instruct the jury upon conflicting presumptions and to charge that the presumption of innocence was stronger than and overcomes any presumption

of the continuance of the life or existence of any person or corporation named in the indictment, etc.

There being no question raised in the case of any presumption except of innocence and good character, this instruction, if granted, could only operate to mislead and confuse the jury. No question of other presumptions went to the jury.

Reference to the general charge of the court at page 69 shows that the court fully instructed the jury upon the presumption of innocence.

The action of the court in refusing to grant the eighteenth prayer, to the effect that if the jury found that any of the moneys mentioned in the indictment came into defendant's possession after January 1, 1902, they must find, before they could convict, that such moneys were not paid out for legitimate expenses, but were fraudulently converted or appropriated by the defendant to his own use, was correct; because it was not necessary that the jury should find the negative fact that the moneys were not paid out for legitimate expenses. Their finding, if they should so find, that the defendant fraudulently converted the moneys to his own use, would exclude every honest use of the moneys, and this instruction as to a negative finding by the jury could have no effect other than to mislead and confuse them.

The court was correct in refusing to grant the twentieth prayer, that the jury be instructed "that * * * they may find the defendant not guilty on the two counts of the indictment, and they must find him not guilty on at least one," because such

instruction could only mislead the jury. The court did give the following instruction in lieu of that offered by the defendant:

> The jury are instructed that upon the evidence in this case they can not find the defendant guilty on both of the counts which are submitted to them.

As above pointed out, the court subsequently instructed the jury to acquit on one of said two counts.

The court was correct in refusing the twenty-second prayer for instruction concerning flight, for the reason that the third instruction of the Government, already granted (Rec., p. 57), was a correct instruction upon this subject. Furthermore, the court very fully instructed the jury upon the question of flight in its general charge (Rec., pp. 68 and 69).

INSTRUCTION AS TO CHARACTER.

The court did not err in refusing the twenty-fifth prayer for instructions (Rec., p. 63), as follows:

> The jury are instructed in this case that the law presumes the defendant to be an upright, honest man, of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence.

The case of *Mullen* v. *United States*, 106 Fed., 892, is cited in support of the doctrine that in a criminal trial in a Federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.

This court said in the case of *White* v. *United States*, 164 U. S., 100, 105:

> When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, *although the court unnecessarily added that the law presumed every defendcnt to have a good character.*

This prayer, however, requests the court not merely to charge the jury that the law presumes a man to be a man of good character, but to charge the jury that the law presumes the defendant to be an upright, honest man of integrity, and to further instruct the jury that they are "bound to assume" him to be such in their consideration of the evidence.

The instruction is also faulty, because it does not limit the operation of the presumption of good character.

It is confidently asserted that no authority can be brought forward to sustain such an instruction or one even approaching it or to sustain any such supposed doctrine of law.

The court was correct in refusing the twenty-seventh prayer of the defendant to instruct the jury that if they believed that any part of the sums of money were delivered by the defendant to his co-receiver, then, as matter of law, the defendant is not guilty as to the money so delivered, for the reason

that the instruction does not pretend to define the manner of the delivery of such moneys to the co-receiver, if there was any such delivery. Such delivery might in itself have amounted to a fraudulent conversion or embezzlement.

Finally, it is submitted that upon the defendant's prayers, as granted in connection with the prayers of the Government, and the general charge of the court, the jury had a full, fair, and correct exposition of the law relating to the facts of this case.

A careful reading of the charge of the court, beginning at page 65, shows that the court was particularly careful to give a fair and impartial charge and to give the defendant every possible benefit.

EXCEPTION AS TO PROOF OF QUALIFICATION OF RECEIVER.

The plaintiff in error attempts to assign as error the failure of the prosecution to produce and prove the bond of the receiver, or his qualification otherwise.

This question was not raised below except in the motion for a new trial, which is not reviewable.

The record shows clearly, however, that the defendant assumed and exercised the duties of the office of receiver.

He is now estopped from attempting to deny the validity of his appointment or qualification.

> An officer who has assumed the duties of the office can not himself dispute the validity of his own appointment, even where he is proceeded against *criminaliter*.
>
> *State* v. *Sellers*, 7 Rich. (S. C.), 368.

REFUSAL TO REQUIRE ELECTION.

The defendant moved the court to require the Government to elect on which of the two (No. 3 and No. 6) remaining counts it would go to the jury, and excepted to the ruling of the court denying the motion.

This ruling of the court is not reviewable.

It is within the discretion of the court to direct the prosecution to elect upon which count of an indictment it will proceed, and its action in that regard can not be assigned for error.

U. S. v. *McBride,* 18 D. C., 371.

But subsequently, after argument, the court charged the jury that there was no evidence in the case justifying a verdict of guilty on the sixth count, and withdrew that count from the jury, leaving only the third count (p. 66). Subsequently a verdict of not guilty was taken on the sixth count.

MISCONDUCT OF PROSECUTORS.

A number of alleged acts of misconduct on the part of the prosecuting attorney and his assistant are assigned as error.

The incomplete nature of the bill of exceptions, as pointed out above, makes it impossible to show why all the statements made in argument to the jury were justified by the evidence.

It is objected that the plaintiff in error was called "a common thief."

If the evidence in the case was sufficient to justify his conviction of embezzlement it certainly justified

the application to him of the epithet "thief," which means: One who steals, especially one who steals furtively, without violence. One who practices overreaching, deceit, etc.

The statement to the jury that the plaintiff in error was depositing funds to his private account and had been guilty of forgery applied not to matters extraneous to the prosecution, but to testimony in the case. It is apparent from the bill of exceptions that these charges were predicated upon the testimony of Eckloff, but, as above pointed out, the testimony of Eckloff is not attempted to be given in the bill of exceptions.

The objectionable argument that defendant did not even try to prove a good reputation was promptly withdrawn upon objection, as was the statement comparing defendant's counsel to phonographs.

It is easy to pick out isolated phrases from long arguments and make them appear in an entirely different light from the reality.

> Alleged misconduct of counsel in the course of argument to the jury is not proper subject of exception except in extraordinary cases, where prejudice is the manifest object of the speaker, and never where the remarks objected to have been withdrawn.
>
> *R. R. Co.* v. *Dashiell*, 7 App. D. C., 507.
> *R. R. Co.* v. *Patterson*, 9 App. D. C., 423.
> See also *Lorenz* v. *U. S.*, 24 App. D. C., 337, 391.
> *Yeager* v. *U. S.*, 16 App. D. C., 356, 362.
> *State* v. *Gartrell*, 171 Mo., 489, 512.

THE JUDGMENT.

The judgment of the trial court is attacked upon two grounds: First, because it included labor in the punishment, and, secondly, because it omitted forfeiture.

It may be said that even if the judgment were erroneous in either of these respects the plaintiff in error would not on that account be entitled to a new trial, but that the errors could be corrected or the case remanded to the trial court with instructions to amend. (*Raymond* v. *United States*, 25 App. D. C., 555; *In re* Bonner, 151 U. S., 242.)

The Court of Appeals found that the trial court was not justified in adding the words "at hard labor," but, having the power to modify as well as reverse a judgment of the Supreme Court of the District of Columbia, modified the judgment by striking out the words "at labor" as being mere matter of surplusage. (R. S., 5539 and 5546; *Ex parte* Karstendick, 93 U. S., 396, 399; *In re* Mills, 135 U. S., 263, 266.)

In disposing of the claim that the judgment should have included the forfeiture provided by the statute, the Court of Appeals said:

> While section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court, having jurisdiction of the offense, is authorized to impose, and it was properly omitted in entering the judgment upon the verdict and fixing the penalty. If effective,

> the question of the forfeiture is for the determination of the Equity Court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement. (Rec., p. 84.)

Even if the judgment should have included the forfeiture provided by the statute the plaintiff in error can not complain of the omission.

The rule is laid down in 19 Encyclopedia of Pleading and Practice, pages 483 and 484, that where a statute provides that forfeiture shall follow conviction for certain offenses, the court may include such a forfeiture, but that a failure to do so is favorable to the defendant and can not be complained of by him.

In 1 Bishop's New Criminal Law, section 931, it is said that if a law provides distinct punishments, sentence to one with the other omitted is not erroneous. (See also Wharton, Criminal Pleading and Practice, sec. 918.)

But the language of the statute does not make forfeiture a part of the punishment. The punishment is by fine or imprisonment, or both. The punishment clause and the forfeiture clause are necessarily severable.

The plaintiff in error endeavors to make it appear (1) that the forfeiture is a necessary part of the judgment, and that its omission renders the judgment void; (2) that the forfeiture clause, having the effect to divest vested rights, makes the statute unconstitutional; and (3) that the conviction and judgment having the effect to deprive him of all right or

claim to commissions, costs, and charges, amounting to more than $5,000, thereby gives this court jurisdiction under its writ of error.

Neither of the above positions can be sustained.

As stated by the Court of Appeals, the question of forfeiture is for the determination of the equity court having jurisdiction in the matter of the receivership.

The false position is assumed by the plaintiff in error that the forfeiture provided by the statute inures to the benefit of the United States.

He says in his brief upon the motion to dismiss the writ of error:

> The law confers no rights upon individuals, but only upon the United States. It does not declare the beneficiary of the forfeiture, and it therefore goes exclusively to the United States that enacted the statute.

The only authority cited by the plaintiff in error is Am. and Eng. Encyc. of Law, vol. 13, p. 69.

The text of the Encyclopedia at the place cited is as follows:

> The only general rule that can be laid down in reference to this matter is that in absence of any constitutional or statutory provision directing otherwise, the proceeds of *fines and penalties* imposed must go to that government, whether national, state, county, or municipal, whose laws or ordinances have been violated by the act or omission of the offender.

Section 841 of the Code provides for the forfeiture of commissions, not only of receivers, but also of

administrators, executors, and other fiduciaries who are guilty of embezzlement.

Irrespective of this statute, the courts have the power to deprive receivers, administrators, executors, and other fiduciaries of their compensation or commissions. "Where a receiver has been guilty of negligence or misconduct in the management of property committed to him, the court may reduce his compensation for such reason, or, if the circumstances warrant, deny him compensation altogether." (23 Am. and Eng. Encyc., 1105; *In re* Sheets Lumber Co., 52 La. Ann., 1337; *In re* Commonwealth F. Ins. Co., 32 Hun. (N. Y.), 78; *Carl* v. *Meyer*, 51 N. Y. Appellate Div., 5.)

"As a rule, where the personal representative unlawfully converts or misappropriates the funds of the estate, or commingles them with his own to the detriment of the estate, he will be denied compensation." (18 Cyc. of Law and Procedure, under the title "Executors and Administrators.")

The forfeiture provided by section 841 clearly is not a forfeiture inuring to the benefit of the United States, but is such a forfeiture as would be enforced by the equity court by refusing to allow to an embezzling receiver the costs, charges, and commissions which would be allowed to an honest receiver.

"To forfeit" has, in this statute, the elemental meaning "to lose."

It might with equal force be argued that section 1180 of the District Code, which provides that "if

any person or corporation shall contract in the District * * * to pay a greater rate than 6 per cent per annum, the creditor shall forfeit the whole of the interest so contracted to be received," gives the United States the right to the interest so forfeited.

But even granting, for the sake of argument, that the forfeiture does inure to the benefit of the United States, the forfeiture would not be enforceable in a criminal action.

The rule is laid down in 19 Cyc. of Law, p. 1359: "It has been said that, if no form of prosecution or of action to enforce a forfeiture imposed by statute has been prescribed, debt will lie when the action is brought by an individual; or, if the Government should be the party plaintiff, an information will lie, upon common-law principles;" citing *Vaughan* v. *Thompson*, 15 Ill., 39.

"A penalty given by a statute can not be recovered in a criminal proceeding." (13 Am. and Eng. Encyc., 64; *Eubanks* v. *Ashley*, 36 Ill., 177; *Fowler* v. *U. S.*, 1 Wash. Ty., 3.)

In all the cases cited by the plaintiff in error upon this point there is involved the construction of customs and internal-revenue statutes which provide for the forfeiture of certain property to the United States.

But the plaintiff in error may argue that if the forfeiture is not properly to be included in the judgment in this case, yet the judgment of conviction, being a finding of the elemental fact of embezzlement,

is conclusive against him, and that the indirect effect of the judgment is the same.

Unless the forfeiture inures to the benefit of the United States the conviction in this case can not in any manner be conclusive against the plaintiff in error.

It is well settled that a verdict is evidence between parties and privies only. (*Cheveront* v. *Textor*, 53 Md., 295; *Wood* v. *Davis*, 7 Cranch, 271; *Davis* v. *Wood*, 1 Wheat., 6; *Wilkes* v. *Dinsman*, 7 How., 89.)

A judgment, to operate as an estoppel or *res judicata* between the parties, must have been entered by a court of competent jurisdiction upon the same subject-matter, between the same parties, and for the same purpose. (*Wash., A. & G. Co.* v. *Sickles*, 24 How., 333; *Same* v. *same*, 5 Wall., 580; *Hopkins* v. *Lee*, 6 Wheat., 109.)

"The persons between whom a judgment or decree in a suit is conclusive in a subsequent suit are the parties to the prior suit and their privies, and as a general rule it is conclusive only between them." (24 Am. and Eng. Encyc. of Law, 724; *New Orleans* v. *Warner*, 175 U. S., 120; *New Orleans* v. *Bank*, 167 U. S., 371; *Ky. Bank* v. *Stone*, 88 Fed., 383, affirmed in 174 U. S., 408, see p. 412).

"It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." (*De Sollar* v. *Hanscome*, 158 U. S., 216, syllabus.)

"It is undoubtedly settled law that a judgment of

a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit." (*Russell* v. *Place*, 94 U. S., 606.)

In the case of *Coffey* v. *United States* (116 U. S., 436), cited by the plaintiff in error, it was held that a judgment of acquittal on a criminal charge is conclusive in favor of the claimant to property sought to be forfeited. This case was one of an information *in rem* for violation of sections 3257, 3450, and 3453 of the Revised Statutes.

In the Coffey case the question as to whether or not a judgment of conviction in a criminal prosecution is conclusive against the accused as claimant in a subsequent suit *in rem*, to enforce the forfeiture, was left open. In a later case, decided in 1896, the case of *The Three Friends* (166 U. S., 1), the Chief Justice, delivering the opinion of this court, says, at page 49:

> We agree with the district judge that the contention that forfeiture under section 5283 depends upon the conviction of a person or persons for doing the acts denounced is untenable. The suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different courts, and the result in each might be

different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed, though lacking as to the identity of the particular person by whom they were committed. (The *Palmyra*, 12 Wheat., 1, 14; The *Ambrose Light*, 25 Fed. Rep., 408; The *Meteor*, 17 Fed. Cas., 178.)

The *Palmyra* was a case of a libel of information against the vessel to forfeit her for a piratical aggression under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held, that, even if such provision had been made, conviction would not have been necessary to the enforcement of the forfeiture. And Mr. Justice Story, delivering the opinion, said:

"It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense, but the right attached only by the conviction of the offender. The necessary result was that in every case where the Crown sought to recover such goods and chattels it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was

applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecution were dependent upon each other. But the practice has been and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. (And see *The Malek Adhel*, 2 How. 210; *United States* v. *The Little Charles*, 1 Brock. 347.)"

The case of *United States* v. *Stowell* (133 U. S., 1), cited by the plaintiff in error, was an information for forfeiture of certain property under sections 3258 and 3305 of the Revised Statutes and section 16 of the Code of February 8, 1875 (18 Stats., 310), which provided that certain property "shall be forfeited to the United States."

The case of *United States* v. *Zucker* (161 U. S.,475), cited by plaintiff in error, was an action against importers to recover the value of merchandise alleged to have been forfeited under the customs administrative act of June 10, 1890 (26 Stats., 131–135).

In the case of *Stone* v. *United States* (167 U. S., 178, 186) the Coffey case is approved, as is also the case of *United States* v. *McKee* (4 Dill, 128); the decision in the McKee case being upon the ground "that the defendant can not be twice punished for the same crime, and that the former conviction and judgment was a bar to the suit for the penalty."

The forfeiture was properly omitted from the judgment, which does not, either mediately or immediately, affect the right of the plaintiff in error to commissions.

It is submitted that the writ of error should be dismissed and the petition for certiorari denied; or that, there being no error in the record, the judgment of the Court of Appeals should be affirmed.

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MARCH, 1907.